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Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of ) GC Docket No. 92-52  
 )  
Reexamination of the Policy )  
Statement on Comparative )  
Broadcast Hearings )

RECEIVED

AUG 22 1994

To: The Commission

REPLY COMMENTS OF JOHN W. BARGER

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Mr. Barger is an applicant in a comparative hearing proceeding for a new FM station in Haltom City, Texas, in which two of the commenting parties are also applicants: Prairie Broadcasting, Inc. (Prairie) and O'Day Broadcasting, Ltd. (O'Day), one of several applicants who filed comments jointly under the lead name, John A. Carollo, Jr. In reply to the comments of Prairie and O'Day, and also in reply to the entire group of comments filed in this rulemaking proceeding, Mr. Barger states:

1. Mr. Barger agrees with the comments of Prairie that existing comparative proceedings may proceed under the "integration" factor and other comparative factors so long as provision is made for alternative evidence of ownership-management by parties who did not rely on any "integration" proposal; also, that parties to existing comparative proceedings may not amend their comparative proposals. He agrees with Prairie on these points for the reasons that it has stated and for the further reason that in the Haltom City proceeding, Mr. Barger challenged the "integration" factor as the exclusive ownership-management structure that might be used, and all

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applicants in that proceeding had the opportunity to respond to Mr. Barger's challenge vis-a-vis their applications. There is no unfairness in holding other applicants to their cases while now permitting Mr. Barger to go forward with his case.

2. Mr. Barger opposes the proposal of Prairie that the Commission reinstate the female gender preference. This preference has been held unconstitutional by the courts. Lamprecht v. FCC, 958 F.2d (D.C.Cir. 1992) from which no certiorari was sought.

3. Mr. Barger opposes the proposal of O'Day that it be given carte blanche to amend its application in relation to whatever modified comparative hearing standards may be adopted. To recast the Haltom City proceeding by allowing all applicants to amend to conform to modified comparative hearing standards at this juncture would be enormously expensive, time-consuming and delaying a proceeding which already has consumed five years since the filing of applications in September 1989. Nor is it appropriate. O'Day had full opportunity to resist the challenge to the "integration" factor as the exclusive means of securing credit for ownership-management. Such exclusive use of "integration" has now been held to be unlawful as arbitrary and capricious. Fairness, efficient agency administration and the public interest all call for the continued processing of the Haltom City applications in the manner proposed by Prairie and endorsed by Mr. Barger in ¶1 above.

4. This is also in accord with the law of "retroactivity"

as applied to adjudicatory changes in agency standards. SEC v. Chenery Corp., 332 U.S. 194 (1947) (upholding retroactive application of a changed SEC policy in an adjudicatory proceeding as serving the public interest of securities regulation against the loss of opportunities of parties to the adjudication to earn profits and gain control of a corporation); Retail, Wholesale & Department Store Union v. NLRB, 466 F.2d 380 (D.C.Cir. 1972) (establishing five-part test for balancing public and private interests in retroactively applying a new agency policy in an adjudicatory proceeding); Clark-Cowlitz Joint Operating Authority v. FERC, 826 F.2d 1074 (D.C.Cir. 1987) (decided by the entire panel, three Circuit Judges dissenting) (approving retroactive change of preferences in comparative proceedings for licenses to operate hydroelectric power plants).

5. In reply to O'Day's unconditional comments in support of local residence, Mr. Barger believes that an application which reflects ownership by local residents but does not reflect ownership by experienced and professional broadcasters, and which proposes that local residents will manage their own station even though they do not have top broadcast management experience that would qualify them to do so in the real-world job market, should be given no credit under any new standards that the Commission might adopt. In today's complex and highly competitive world of radio broadcasting, inexperienced top management of a new radio station is an invitation to disaster that offers no reasonable likelihood of effectuation of program service in the public

interest. New standards should augment and strongly endorse comparative credit for parties having broadcast experience and a record of performance and growth in their professional career achievements.

6. It would be intolerable, and Mr. Barger believes, unlawful, for the Commission to employ a lottery or any form of bidding to deal with pending comparative proceedings to parties. He calls the attention of the Commission to the fact that none of the comments filed in this rulemaking proceeding by a wide ranging group of commenting parties, reflecting disparate points of view on many questions, supports the notion of employing a lottery or any form of bidding to deal with existing proceedings, except in the highly limited situation of employing a lottery to break a tie based upon the substantive comparative factors, a provision that has been in the rules for a number of years.

Respectfully submitted,

  
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Gene A. Bechtel

Bechtel & Cole, Chartered  
Suite 250  
1901 L Street, N.W.  
Washington, D.C. 20036  
Telephone 202-833-4190  
Telecopier 202-833-3084

Counsel for John W. Barger

August 22, 1994

Certificate of Service

I, Gene A. Bechtel, certify that I am causing copies of the foregoing REPLY COMMENTS OF JOHN W. BARGER to be served this 22nd day of August 1994 on the following individuals:

Via Hand Delivery

The Honorable Joseph A. Marino  
Chairman, Review Board  
Federal Communications Commission  
2000 L Street, N.W. -- Suite 211  
Washington, D.C. 20554

The Honorable Marjorie R. Greene  
Member, Review Board  
2000 L Street, N.W. -- Suite 204  
Washington, D.C. 20554

Allan Sacks, Esq.  
Chief for Law, Review Board  
2000 L Street, N.W. -- Suite 205  
Washington, D.C. 20554

Robert Zauner, Esq.  
Hearing Branch, Mass Media Bureau  
Federal Communications Commission  
2025 M Street, N.W. -- Suite 7212  
Washington, D.C. 20554

Via Mail

Lawrence J. Bernard, Jr., Esq.  
Law Offices of Lawrence J. Bernard, Jr.  
2000 L Street, N.W. -- Suite 504  
Washington, D.C. 20036-4988  
(Counsel for Melanie Bruton)

Ricardo A. del Castillo  
Madeline A. del Castillo  
Madalina Broadcasting, Inc.  
4308 Fannin Drive  
Irving, Texas 75038

Kathryn R. Schmeltzer, Esq.  
Fisher, Wayland, Cooper & Leader  
2001 Pennsylvania Avenue, N.W.  
Suite 400  
Washington, D.C. 20006  
(Counsel for Prairie Broadcasting, Inc.)

Robert S. Stone, Esquire  
McC Campbell & Young  
P.O. Box 550  
Knoxville, TN 37901  
(Counsel for Jonathan and Mary Lyn Wolfert,  
a General Partnership)

Harry C. Martin, Esquire  
Reddy, Begley & Martin  
1001 22nd Street, N.W. -- Suite 350  
Washington, D.C. 20037  
(Counsel for Poder Broadcasting, Inc.)

J. Jeffrey Craven, Esquire  
Besozzi & Gavin  
1901 L Street, N.W. -- Suite 200  
Washington, D.C. 20036  
(Counsel for O'Day Broadcasting, Ltd.)

James A. Gammon, Esquire  
Gammon & Grange  
8280 Greensboro Drive -- 7th Floor  
McLean, VA 22102  
(Counsel for Hispanic Coalition, Inc.)

  
Gene A. Bechtel